

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1286

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

B

THE UNITED STATES OF AMERICA

Plaintiff

vs.

C/A Ref. No.
T-6166

ALFRED DANIEL MILLER

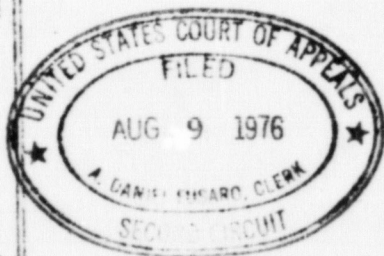
Defendant

P/S

Appendix for Defendant--Appellant

CARLISI, CARLISI & TRAFALSKI
Attorneys at Law
Office and P.O. Address
820 Prudential Building
Buffalo, New York 14202
Telephone No. (716) 852-0811

GERALD M. TRAFALSKI,
Of Counsel



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APPENDIX

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**CRIMINAL DOCKET
UNITED STATES DISTRICT COURT**

JOHN T. ELFVIN

A

CR - 75 - 108

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	Edward Wagner, AUSA
ALFRED DANIEL MILLER	U.S. Courthouse Buffalo, N.Y. 14202
Willfully, unlawfully and with felonious intent, did by force, violence and intimidation take from an employee, money belonging to an FDIC-Insured bank, (Ct. 1), in violation of Title 18, U.S.C., Section 2113(a); did take and carry away with intent to steal and purloin money belonging to an FDIC-Insured bank, (Ct. 2), in violation of Title 18, U.S.C., Section 2113(b); In the act of taking money belonging to an FDIC-Insured bank, by force & violence from an employee, did assault the employee (Ct. 3), in violation of Title 18, U.S.C., Section 2113(d)	
	For Defendant: DAVID C. QUINN, Esq. (Assigned) Gerald M. Trafalski (assigned) 820 Prudential Bldg. Buffalo, N.Y. 14202
Offense: 7/31/1975	3 Cts.

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed 8/5/75	Clerk				
J.S. 3 mailed	Marshal				
Violation	Docket fee				
Title 18					
Sec. 2113(a), 2113(b) & 2113(d)					

DATE	PROCEEDINGS
Aug. 14	Filed Indictment
" 14	J.S. 2 made
Aug. 6	Filed Cy. 5 of CJA-20 - Order appointing David C. Quinn, as counsel-Maxwell, Mag.
Aug. 8	Filed Magistrate's docket, temporary commitment, complaint, with affidavit
Aug. 15	Deft. being duly arraigned enters a plea of not guilty. Bail set at \$10,000. Return date for motions - 9/8/1975 - 2:00 P.M. Deft. re-appears and enters a plea of guilty to count One of the Indictment, which was accepted by the Court. The Court continued bail at \$10,000 and set a date for Sentencing - 9/12/75 at 9:00a.m.
Aug. 15	Filed Ct. Stenographer's transcript of 8/15/75 (2 transcripts)
Aug. 18	Filed Magistrate's Final Commitment
Sept. 26	Filed Ct. Steno's minutes of 9/26/75
Sept. 26	Deft appeared for sentence Court withdraws plea of Guilty and reinstates plea of not guilty, and will later set an early trial date. The court relieved Atty. Quinn from assignment as Atty. for Deft. and announced appointment of Gerald M. Trafalski.
Oct. 17	Filed Govt's motion to move action for trial

DATE	PROCEEDINGS
1975	
Nov. 10	Court directed deft. to make any motions returnable on 11-17-75
Nov. 17	Adj. to 2:00 P.M. on November 24, 1975
Nov. 25	Filed Order that the deft. be examined as to his mental condition by Bruno G. Schutkeker, M.D., etc., pur. to Sect. 4244, T.18, U.S.C., to determine sanity at the time of the commission of the offense; to determine if he is able to stand trial, and if he understands the proceedings against him, etc.--ELFVIN, J.
Nov. 24	Court will sign order for mental exam to be furnished by AUSA; Atty. Trafalski reserves right to make motions until review of Tape of preliminary hearing. (see entry above for signed order)
Dec. 1	Filed authorization for psychiatric examination.
1976	
Feb. 9	Court grants motion by Govt. to have deft. examined by psychiatrist as deft. will offer proof of defense of insanity. The court directed case be recalendered to set date for trial on 3-15-76.
Mar. 15	Case set for trial 5/4/76
May 11	Filed subpoena - Paul Sciabannas, served 5/3/76; Karen Rice - served 5/3/76; Helen Keegan, served 5/5/76; Linda Frazier, served 5/7/76
May 10	To set date for trial. Adj. to 5-18-76
May 18	Case ready for trial, counsel to advise Court by noon on 5/19/76 whether Jury to be Selected on 5/20/76 or 5/25/76
May 25	Govt. moves case to trial before Judge Elfvin, at Buffalo, N.Y., whereupon Jury is duly impanelled and sworn. Govt. rests; Court denies Deft's motion to dismiss and motion for mistrial. Trial adj. 5/26/76 taken before
May 25	Hearing on motion to suppress statement -/before jury sworn - Court denies motion to suppress statement, but grants motion to deny evidence of convictions if deft. takes witness stand.
May 26	Trial continues from yesterday with same appearances --Deft. renews motions. Counsel make closing remarks; Court charges the jury; jury leaves to begin their deliberation-. The jury returns with a verdict of guilty on all three counts. Court increases bail to \$20,000; Sentencing set for 6/7/76.
May 27	Filed subpoena to testify - Dr. Richard F. Miller, served 5/26/76
June 1	Filed Govt's certificate of service of mail
June 2	Filed CJA 20 copy 5 order appointing Gerald Trafalski as counsel, copy 4 to Adm. office, remaining copies to Atty. for submission of voucher. ELFVIN, J.
June 7	Court denied motion by deft. Miller to dismiss for failure to afford a speedy trial. The Court then sentenced deft. to the custody of the Attorney General on Count One for a period of Fifteen (15) Years; On Count Two for a period of Eight (8) Years, concurrent with the sentence on Count One; on count three for a period of Fifteen (15) Years concurrent with the sentence on count One--Elfvin, J.
June 8	Filed Deft's notice of appeal
June 8	Filed Cy. 3 of CJA-21 - Authorization for Transcript ; Cy. to the Adm. office.
	XX
June 14	Filed Judgment and Commitment. Commitment issued.
June 14	Filed Ct. Steno's minutes of 6-7-76 before Hon. Judge Elfvin.

CLOSED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-vs-

ALFRED DANIEL MILLER,

Defendant

:

:

:

:

CR. 75-198

TRIAL MEMORANDUM

PRELIMINARY STATEMENT

On August 14, 1975 the defendant, ALFRED DANIEL MILLER, was indicted by the Federal Grand Jury for violations of Title 18, U.S.C., §§2113(a), (b) and (d), arising out of the robbery of the Marine Midland Bank, Main and Seneca Streets, Buffalo, New York, on July 31, 1975, at which time approximately \$1,943.00 was taken. Count I charges the violation of T. 21, U.S.C. §2113(a), with respect to the robbery of said bank; Count II charges the larceny violation, §2113(b); and Count III charges that in the commission of the above-mentioned offenses, Mr. Miller assaulted the teller, Karen Rice, a violation of T. 18, U.S.C., §2113(d).

This latter charge was based on the fact that the defendant displayed to the victim teller a realistic replica of a .38 caliber pistol, which at the time she felt to be a real gun, and which resulted in her assault.

On August 15, 1975 the defendant entered a guilty plea to Count I of the indictment, although at the date of the scheduled sentence, September 26, 1975, in response to the Court's offer to speak at his sentence, the defendant attempted to exalt himself from criminal responsibility by claiming a mental disturbance at the time of the act. For this reason, his plea was vacated, and the matter was set down for trial.

Mental examinations followed, with the defendant receiving two conflicting evaluations; one of them by Dr. Bruno Schutkeker found that the defendant lacked sufficient competency at the time of the act to bear criminal responsibility, and the other, by Dr. Richard Miller, found that the defendant was in fact competent at the time of the act and should bear criminal responsibility.

Trial Transcript
pp. 101-106

- 1 Q Well, did he then - - In any event, did he turn around
2 and look at that point?
- 3 A Yes.
- 4 Q What did you do when he stopped?
- 5 A I told him to put his hands on his head and just stand
6 still.
- 7 Q Did he have anything with him at that time?
- 8 A Yes, he had a bag, a green and bluish cloth bag in his
9 hand, and I asked him to drop it, and he would not
10 drop it, at which time I took it out of his hand.
- 11 Q Mr. Langer, was that the same green and blue bag that
12 you remember him - - seen him carrying when you first
13 saw him?
- 14 A Yes, sir.
- 15 Q Showing you what has been marked Government's Exhibit
16 11 for identification, which is in a plastic envelope,
17 I will ask you to take that out and look at it and if
18 you recognize it, tell the jury what that is, please?
- 19 A Yes, sir, I do recognize this as being the bag that
20 Mr. Miller had in his hand at the time I stopped him.
- 21 Q Now, just to clear up one point, at the time you stopped
22 him, did you know his name?
- 23 A No, sir.
- 24 Q You subsequently learned his name?
- 25 A I subsequently learned his name.

1 Q Would you tell us what happened then, you took the bag
2 out of his hand?

3 A At this point, I examined the contents of the bag.

4 Q Can you tell us, sir, what you found in the bag?

5 A Yes, sir. I found what I later determined to be a
6 Colt - - a replica of a Colt Police .38 revolver.

7 Q Showing you Government's Exhibit 6 for identification,
8 I will ask you if you can recognize that, sir, and if you
9 do, I would like you to tell the jury what that is?

10 A Yes, sir, I recognize this as being the replica of
11 the Colt .38 revolver which I found in the green and
12 blue bag.

13 Q Did you find anything else in the bag?

14 A Yes, sir, I did. I found a pair of sunglasses.

15 Q Showing you Government's Exhibit 13 for identification,
16 I will ask you if you recognize those?

17 A Yes, sir.

18 Q Would you tell the jury what they are?

19 A These are the sunglasses that I found in the green and
20 blue bag.

21 Q Anything else you found in the bag, sir?

22 A Yes, sir, I found a pair of safety glasses.

23 Q Would you describe those for us?

24 A These are just clear safety glasses with a plastic along
25 the sides.

1 Q I will show you Government's Exhibit 12 for identifica-
2 tion.

3 A Yes, sir, I recognize the safety glasses as being the
4 ones I found in the blue and green bag.

5 Q Would you tell us what else you found in the bag, if
6 anything else?

7 A I found a green shirt, what appeared to be a male shirt,
8 belonging to a male.

9 Q Showing you Government's Exhibit 14 for identification,
10 I would like you to tell us if you recognize that, if
11 you can, sir?

12 A Yes, sir, I do, the green shirt I found in the green and
13 blue cloth bag.

14 Q Anything else, sir, in the bag at that time?

15 A I found an A.M.&A's paper bag.

16 Q Showing you Government's Exhibit 17 for identification,
17 again, would you examine that and tell us what that is,
18 if you know?

19 A Yes, sir, this is the green and blue paper A.M.&A's
20 bag that I found in the blue and green cloth bag.

21 Q Would you tell us if you found anything else in the
22 bag?

23 A I found a five and a half inch blade knife.

24 Q Can you describe what that was like for us?

25 A It's silver in color with a figurine on top.

1 Q When you say "on top", what do you mean?
2 A On the handle.
3 Q Showing you Government's Exhibit 7 for identification,
4 do you recognize that, sir?
5 A Yes, sir, I recognize this as being the knife which
6 I found in the green and blue cloth bag.
7 Q Did you find anything else?
8 A I found a knife case.
9 Q Would you describe what that was like?
10 A A brown knife case, approximately five or six inches
11 long.
12 Q Showing you Government's Exhibit - -
13 THE COURT: A knife case?
14 THE WITNESS: A knife case.
15
16 BY MR. WAGNER:
17 Q K-n-i-f-e?
18 A Yes, sir.
19 Q Showing you Government's Exhibit 15 for identification.
20 A Yes, sir, I recognize this as being the knife case I
21 found in the green and blue cloth bag.
22 Q Did you find anything else in the bag?
23 A I found a man's sportcoat or suitcoat.
24 Q Can you describe that?
25 A Gray in color.

1 Q Showing you Government's Exhibit 9 for identification,
2 I would like you to look at that, sir, and tell us
3 if you can remember that and, if so, what that is,
4 please?

5 A Yes, sir, I recognize it as being the grey jacket that
6 I found in the blue and green cloth bag.

7 Q Anything else in the bag?

8 A I found a purple and black cap in the bag.

9 Q Showing you Government's Exhibit 10 for identification.

10 A Yes, sir, this is the purple and black cap which I
11 found in the blue and green cloth bag.

12 Q Did you find - -

13 THE COURT: What is that number?

14 MR. WAGNER: That's Government's Exhibit 10.

15 THE COURT: Actually, Government's Exhibit 10
16 is the cap itself, Mr. Wagner?

17 MR. WAGNER: Actually, these have been in bags,
18 Mr. Langer is opening the bags as he is
19 testifying. I will ask that Mr. Langer
20 put the exhibits back into the right
21 bags so there is no confusion here.

22 BY MR. WAGNER:

23 Q Mr. Langer, inside this blue and green bag, was there
24 anything else?
25

1 A I found a white Marine Midland cloth bag.

2 Q Can you tell us what that looked like and anything else
3 you know about it?

4 A It had on the face of it, on one side of it, the words
5 Marine Midland.

6 Q Showing you Government's Exhibit 16 for identification,
7 that again is in a plastic bag, I will ask you to take
8 the contents out and examine them, please.

9 A Yes, sir, this is the white Marine Midland bag that
10 I found in the green and blue cloth bag.

11 Q Can you tell us if you found anything else?

12 A Yes, sir, I found also in the green and blue cloth
13 bag approximately \$1,943 in American currency.

14 Q Mr. Langer, the exhibits that you have just identified
15 for us, including the last one, the currency, what did
16 you do with those at that time, and subsequent to that?

17 A Well, I took all the items, including the \$1,943, back
18 to the bank.

19 Q Did you have any other dealings with this fellow you
20 apprehended at that time, or did you just take custody
21 of these items?

22 A I mainly just took custody of these items. I saw him
23 for a couple of seconds later.

24 Q Can you tell us who was with you then?

25 A I maintained custody of all the previously mentioned

Trial Transcript
pp. 113-117

1 MR. TRAFALSKI:

Your Honor, I respectfully move
before this Court for a mistrial in this
case based upon the fact that a weapon,
a knife, was produced which was allegedly
found - -

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6 THE COURT:

A knife, weapon or what?

7 MR. TRAFALSKI:

A weapon, to wit, a knife, was
produced which was found in some bag
allegedly in the possession of the
defendant. He is not charged with using
a knife or attempting to use a knife.
He is charged with using a replica
pistol or a toy gun in this instance.
The prejudice of that knife being brought
in here fairly outweighs the introduction
of it into evidence or the production of
it before this Court and jury. Now the
jury is of the opinion that perhaps Mr.
Miller would have used a knife, et
cetera, or that he had an actual knife
in his possession where there is no
allegation of that in any stage of this
proceeding, he is charged with a toy
pistol.

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25 MR. WAGNER:

Your Honor, I disagree with Mr.

1 Trafalski. First of all, there is
2 evidence that the knife was in his
3 possession, it was found in the bag.

4 THE COURT:

There is no evidence that it had
5 anything to do with the robbery.

6 MR. WAGNER:

7 We are not alleging it did. There
8 is no testimony, there is no argument
9 that he threatened the teller with the
10 knife. That is an argument outside the
11 facts. The fact is that the man had a
12 knife in his possession when he robbed
13 the girl. That is directly relevant
14 for two reasons. First of all, - -

15 THE COURT:

What has that got to do with it?

16 MR. WAGNER:

17 First of all, if an insanity
18 defense is later raised, which I expect
19 it may be, it proves that - - and part
20 of the insanity defense is going to be
21 that the man did not appreciate the
22 wrongfulness of his acts, that is the
23 law, we are going to argue that a man
24 who did not appreciate the wrongfulness
25 of the act, and therefore thought it was
not wrong to rob banks, would not take
steps to harm himself, would not take

1 steps to flee, would not take steps to
2 conceal his identity, change his clothes
3 after the robbery, would not take steps
4 to write out a demand, if he thought it
5 was not wrong, he would not do those
6 things. Mr. Miller is charged with
7 assaulting the teller by obviously
8 pointing the gun at her, but the question
9 might be in the jury's mind does he do
10 that knowingly and willfully and in-
11 tentiously, that is, does he appreciate
12 that a weapon is a weapon, that the gun
13 might scare you. Does he have an under-
14 standing of guns? If Mr. Miller were a
15 man from a foreign culture and knew
16 nothing about guns, you might argue that
17 it wasn't intentional because he didn't
18 know what a gun was. The fact is, he
19 was carrying a knife, and he was carrying
20 it with him when he was arrested, it
21 shows that he knows. I think the jury
22 can infer - - we can argue that he had
23 it, it's an inference that he had it - -
24 THE COURT: It did not come into the activities
25 at the bank.

1 MR. WAGNER:

I think if a man has a knife in his pocket, it shows his guilty state of mind, it shows that it is a willful act.

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4 THE COURT:

No. I think your first argument is good, that is, it may have some bearing upon the overall sanity and finding of objectivity of the defendant.

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8 MR. WAGNER:

I think, your Honor, - -

9 THE COURT:

If it is in for that purpose, fine. Otherwise, we have a prejudice of the knife being brought into view of the jury and talked about as being on the defendant's person when, in fact, it had no involvement with the bank.

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14 MR. WAGNER:

Well, Mr. Trafalski can obviously argue - - I am not arguing that it did have an involvement at the bank - - he can argue that he didn't show it to the teller, we are not saying he did.

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19 THE COURT:

There is going to be the insanity defense evidence put in, and I don't know what the substance of it will be, how much there will be to it, but I can agree if it is in, it has some probity, but it is seemingly better to wait bring-

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1 ing in items to rebut that until you
2 get to a rebuttal situation. Neverthe-
3 less, I am not going to grant the mis-
4 trial at this point. We will take a
5 recess. That denial is without preju-
6 dice, Mr. Trafalski.

7 MR. TRAFALSKI:

Yes, your Honor. Thank you, your
Honor.

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10 (Thereupon, the court was in recess
11 at 2:40 p.m.)
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Trial Transcript
pp. 213-221

1 (Thereupon the jury exited the
2 courtroom at 11:25 a.m.)

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4 MR. TRAFALSKI:

Your Honor, at this time I renew
5 my motions made previously at the close
6 of the People's case.

7 THE COURT:

All right. You had a motion for
8 a dismissal or a directed verdict and
9 you had a motion for a mistrial. I will
10 deny the motion to dismiss but, Mr.
11 Wagner, what about the mistrial?

12 MR. WAGNER:

Your Honor, as I understand it,
13 Mr. Trafalski's grounds are that a knife
14 which was found on the defendant was
15 mentioned in the trial although that is
16 not going into evidence, nor will the
17 jury see it. My position is that it is
18 certainly not prejudicial. I feel that
19 the knife would be admissible, if the
20 Court saw fit, I won't argue the point,
21 I don't feel it is that probative to
22 our case, but the fact is that the
23 defendant did have it on his presence
24 when arrested, that is the testimony
25 and there is no evidence to contradict

1 that. Because it was on his presence,
2 because it is a weapon clearly, because
3 the man is charged with a crime involving
4 force and violence and premeditation,
5 intent, knowledge, scheme, design, motive,
6 the fact that he carried a weapon with
7 him, in my opinion is very relevant.

8 THE COURT:

In the absence of your having asked
9 the psychiatrist anything about it --

10 MR. WAGNER:

About the knife?

11 THE COURT:

-- how would this interrelate with
12 any competency or knowledge or intent?

13 MR. WAGNER:

I did not ask the psychiatrist about
14 the knife because Mr. Trafalski objected
15 to it being used, and your Honor prevented
16 it from being admitted.

17 THE COURT:

That is right. At that time you
18 were indicating that this had a bearing
19 upon the man's mental competency and
20 intentions at that time because here he
21 was carrying this weapon, although he
22 had the toy gun or replica of a gun.

23 MR. WAGNER:

I did not ask the doctor about the
24 knife, I did not want to raise an issue
25 that Mr. Trafalski had objected to.

1 THE COURT:

2 You mean you did not understand me
3 when I indicated that my ruling at that
4 time was without prejudice to the
5 renewal of that motion, and that you
6 were going to somehow interrelate this
into the competency problem?

7 MR. WAGNER:

8 Apparently I did not understand that.
9 It is my position, Judge, that the
10 decision I made was based on the fact
11 that having a replica pistol with him
12 is support for that argument. The
13 argument can be made to the jury on the
14 replica pistol. The danger of invoking
15 Mr. Trafalski's disapproval, because I
16 am anxious to avoid any problem at all
17 that I can avoid, because we had the
18 gun to support the same argument, I
19 was prepared to drop the knife issue
20 completely, but I don't think it is
21 prejudicial. I don't think there is
22 anything wrong with it, but I felt that
23 under all of the circumstances, weighing
24 what I had with the additional benefit
25 that knife would give us, it was not
worth taking the risk of creating an

1 issue at trial when I had so much other
2 corroborating facts to make my same
3 argument. If the knife was the only
4 item, perhaps I would have argued more
5 vigorously for it, but because of Mr.
6 Trafalski's objection and because it was
7 not admitted in evidence and because
8 I had the gun to support the same
9 argument, to raise the same argument,
10 I felt that to argue concerning the
11 knife was perhaps, to use a phrase, a
12 slight measure of overkill. I don't
13 think I needed it that bad, but I don't
14 think it is prejudicial or improper.

15 THE COURT:

Do you have anything you want to
say on that, Mr. Trafalski?

16
17 MR. TRAFALSKI:

Your Honor, the mentioning of the
18 knife by the officer involved -- I
19 believe it was Officer Langer -- and
20 the production of it in view of the jury,
21 the defendant is charged with a crime
22 which needs the use of violence and
23 force to take possession of the money,
24 he is not charged, one, with any
25 possession of a knife or the use of any,

1 he is charged with the toy pistol. The
2 conclusion which the jury can draw from
3 the introduction of the knife into
4 evidence or the fact of just bringing
5 it before them are so prejudicial that
6 they outweigh its probative value, and
7 I believe it has tainted the jury's
8 mind to the point where they have a
9 different picture of this defendant than
10 as was testified to before this Court.

11 MR. WAGNER:

12 I would like to just rebut briefly,
13 your Honor. Mr. Miller isn't specifically
14 charged with having a toy pistol, nor
15 is it necessary to charge the defendant
16 with possession of those instrumentalities
17 which give rise to the force, violence,
18 intimidation or assault. He is not
19 charged by specifically saying, 'You have
20 assaulted her with a pistol or you have
21 assaulted her with a gun.' He is charged
22 with by force, violence and intimidation.
23 I think more importantly, he is charged
24 with doing that willfully.

25 THE COURT:

That has a bearing on the assault
aspect of Subsection (d), does it not?

1 MR. WAGNER:

I don't believe the knife has any relevancy if she didn't see --

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3 THE COURT:

That is right, that is what Mr. Trafalski is saying. So therefore he is saying that Mr. Miller is then prejudiced by having a knife brought into the evidenciary picture.

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8 MR. WAGNER:

I disagree, I think that the value of the knife, if it were admitted and argued, is that it shows knowledge, intent, scheme, design, consciousness of --

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13 THE COURT:

That is why I particularly note the absence of any follow-up in that regard with the psychiatrist.

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16 MR. WAGNER:

I think Dr. Miller -- Dr. Schutkeker had his own report -- Dr. Miller said he based part of his conclusion, it was a factor, that the man had carried out a plan. I think the fact that he carried with him a note, a knife, a gun, that he changed his clothes, shows plan. The fact that we will not be allowed to argue that the knife was part of the plan is one aspect of it,

1 but for the jury to have heard that the
2 knife was found on him, in a sense that
3 is prejudicial only as far as everything
4 else against him, the entire Government's
5 case is prejudicial to the defendant.
6 The photographs are prejudicial to him
7 in the sense they incriminate him, the
8 handgun incriminates him, being caught
9 with the bait money incriminates him.
10 It is all prejudicial to him.

11 THE COURT:

You have to have something that has
relevance.

13 MR. WAGNER:

Well --

14 THE COURT:

The knife and the bag, with no
knife being shown in the bank or other-
wise used, has no relevance.

17 MR. WAGNER:

It doesn't have --

18 THE COURT:

I thought you were going to show
relevance?

20 MR. WAGNER:

I think it has relevance if it were
admitted, but I think I can argue
strenuously that it is not prejudicial
either. Like the A.M.&A's bag has no
relevance, no probative value, other
than it was on him, anymore than a

1 handkerchief in his pocket, but it is
2 not prejudicial. As a matter of fact,
3 I think the knife, if it were admitted,
4 would be admitted very wisely on the
5 argument that it does show plan, it
6 shows consciousness that the act was
7 wrong.

8 THE COURT:

Well, I agree. In a situation
9 where there was not psychiatric testimony
10 based upon psychiatric examination, I
11 could see that you would leave this to
12 lay argument and lay evaluation, but
13 where you have psychiatric testimony and
14 an issue of insanity in the case, it
15 seems to me that ought to have been
16 dealt with by the psychiatrist --

17 MR. WAGNER:

Your Honor --

18 THE COURT:

-- particularly in view of what I
19 understood you to say at the time I
20 denied the motion for a mistrial without
21 prejudice.

22 MR. WAGNER:

When the knife was not admitted in
23 evidence, it is my understanding that
24 for me to discuss it would cause two
25 problems; one, it might be improper,

1 not necessarily prejudicial, but improper
2 for me to be discussing with the
3 psychiatrist items not in evidence and,
4 two, because Mr. Trafalski had objected
5 to mentioning the knife, and because
6 your Honor had sustained his objection
7 to its offer into evidence, I balanced
8 the need to argue that particular item
9 along with all the other items I had
10 available, and that is the reason I
11 didn't mention it.

12 THE COURT:

13 You left me with the raw problem
14 of whether or not there was any substan-
15 tial prejudice to the defendant from
16 having that mentioned. I will decide
17 that. We will be back here at 1:00
18 o'clock and I will be able to tell you
19 then what my ruling is on this motion
20 for a mistrial, also, if there is no
21 mistrial, we will go into oral arguments
22 and I will advise you at that time what
I am doing with your requests.

Trial Transcript
pp. 227-228

1 THE COURT:

No matter what I do, if you have
that solicitude for that and of our
Government in the future, maybe you
ought not to have mentioned the knife.

2
3
4
5 MR. WAGNER:

I am convinced, your Honor, there
is nothing improper about it. How can
I speculate as to what Mr. Trafalski
will object to or what he won't. I
suppose I could offer no evidence, but
that is not the way you prosecute cases.

6
7
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10
11 THE COURT:

There should have been no mention
of the knife. I will have to decide
whether it is prejudicial. 1:00 o'clock.

12
13
14
15 (Thereupon the court was in recess
at 12:00 noon.)

16
17
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19
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21 * * * * *

1 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 1:10 P.M.

2
3 (Defendant present, counsel present,
4 jury absent.)

5
6 THE COURT:

Mr. Trafalski, upon further
consideration, I have decided to deny
your motion for a mistrial, deeming that
there has been no material or substantial
prejudice to your client in this
situation.

11
12 MR. TRAFALSKI:

Thank you, your Honor.

13 THE COURT:

As far as the requests to charge
are concerned, I have really a request
to charge from Mr. Trafalski on behalf
of the defendant, comprising four pages,
and basically, with the exception of the
last full paragraph on the second page,
which differs somewhat from the charge
I am going to give, which comes from
United States vs. Freeman in the Second
Circuit, I will be charging what you
have there. As far as the Government's
requests --

24
25 MR. WAGNER:

Your Honor, Mr. Trafalski and I

Trial Transcript
p. 328

1 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 4:23 P.M.

2
3 (Defendant present, counsel present,
4 jury present.)

5
6 THE COURT:

I have an indication that the jury
has reached a verdict. Who will speak
for the jury? Mr. McKeller. Is that
true the jury reached a verdict?

7
8
9
10 FOREMAN:

Yes, it is, your Honor.

11 THE COURT:

How does the jury find as to Count 1?

12 FOREMAN:

Guilty as charged.

13 THE COURT:

As to Count 2?

14 FOREMAN:

Guilty as charged.

15 THE COURT:

As to Count 3?

16 FOREMAN:

Guilty as charged.

17 THE COURT:

Is there a request to poll the jury?

18 MR. TRAFALSKI:

None, your Honor.

19 THE COURT:

All right, thank you very much.

20 That concludes your service in the case,
21 and I thank you for your time and
22 consideration. Now, as I understand it,
23 three of the jurors have some problems.
24 I will speak with you three individually.
25 The other nine, we will need to have you

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Plaintiff

vs.

C/A Ref. No.
T-6166

ALFRED DANIEL MILLER

Defendant

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

CLIFFORD SOLOMON, being duly sworn, deposes and says:

That I am employed by the law firm of CARLISI, CARLISI
AND TRAFALSKI.

That on or about the 4th day of August, 1976, I personally delivered two copies of the Briefs and Appendices in the above entitled action to the office of the United States Attorney in Buffalo, New York.

That GERALD M. TRAFALSKI has been assigned to represent the defendant-appellant, ALFRED DANIEL MILLER.

Clifford Solomon
CLIFFORD SOLOMON

Sworn to before me this
4th day of August, 1976.

P. Joyce D'Amato

NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN ERIE COUNTY
My Commission Expires March 30, 1977